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No. 97-1996

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ALBERT CAMPBELL, et al., *Petitioner*,

v.

STATE OF CALIFORNIA, et al., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTION PRESENTED

Whether this Court should grant a Petition for Writ of Certiorari to review whether the United States Court of Appeal for the Ninth Circuit properly upheld the factual and evidentiary rulings made by the trial court in issuing an injunction solely under state nuisance law to abate environmental harm where the injunction was issued pursuant to the proper exercise of the federal court's pendent jurisdiction?

LIST OF PARTIES

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No. 97-1996

ALBERT CAMPBELL, et al., *Petitioner*,

v.

STATE OF CALIFORNIA, et al., *Respondent*.

Respondent, State of California, on behalf of the California Department of Substances Control (State), submits this opposition to the Petition for Writ of Certiorari (Petition) filed by the executors of the Victor Muscat Estate, hereinafter referred to as Petitioner. The Petition seeks review of a decision of the Ninth Circuit Court of Appeals upholding the issuance of an environmental cleanup injunction issued solely under state nuisance law pursuant to the proper exercise of the district court's pendent jurisdiction. The State respectfully requests that this Petition be denied in its entirety because the Petition involves solely a question of state law, disputes the trial court's factual findings and evidentiary rulings, which have been reviewed thoroughly and affirmed by a federal appellate court, and fails to present any issues where there exists a conflict between federal circuit courts on a significant federal question. This case merely involves the straight-forward application of established state law to the facts of the case and a challenge to factual and evidentiary rulings which are within the sound discretion of the trial court.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 138 F.3d 772 (9th Cir. 1998). A copy is attached to the Petition as Appendix A.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on March 9, 1998. This Court has jurisdiction under 28 U.S.C. section 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The following statutory provisions are pertinent to this Petition: 28 U.S.C. sections 1331 and 1367(a); 42 U.S.C. sections 9607(a) and 9613(b); and California Civil Code section 3494.

28 U.S.C. section 1331. Federal question:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. section 1367. Supplemental jurisdiction:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action

within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

42 U.S.C. section 9607. Liability:

[CERCLA § 107]

(a) Covered persons; scope; recoverable costs and damages . . .

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --

. . .

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; . . .

42 U.S.C. section 9613. Civil proceedings:

[CERCLA § 113]

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

California Civil Code section 3494. [Public actions]:

A public nuisance may be abated by any public body or officer authorized thereto by law.

STATEMENT OF THE CASE

This case was initiated by the State as a cost recovery action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. sections 9601 et seq., with pendent state claims for injunctive relief under California public nuisance laws. In the courts below, the State prevailed on a partial summary judgment motion for a permanent injunction against Petitioner to abate a nuisance caused by groundwater contamination. Although the cost recovery action continues in the district court, Petitioner seeks this Court's review of the issuance of the injunction, part of which is now moot.

A. The District Court Proceeding

On April 12, 1993, the State initiated this action in federal district court seeking cost recovery under CERCLA and injunctive relief under state nuisance laws against Albert Campbell and Charles Tackman, as Trustees of the Victor Muscat Testamentary Trust (Trustees) and as Executors of the Estate of Victor Muscat (Executors). The State sought a permanent injunction under state laws, including California Civil Code section 3494, to abate the public nuisance caused by the trichloroethylene (TCE) contamination at and from the hazardous substance site in Chico, California known as the 20th Street Site. There, Victor Industries operated for decades and dumped large quantities of contaminants to the soil.

The federal district court has jurisdiction over the State's cost recovery claims under the express provisions of CERCLA, 42 U.S.C. sections 9607(a) and 9613(b), and under 28 U.S.C. section 1331. The exercise of pendent jurisdiction over the state law nuisance claims was appropriate pursuant to 28 U.S.C. section 1367(a). Under California law, polluted water is a public nuisance, *Carter v. Chotiner*, 210 Cal. 288, 291, 291 P. 577, 578 (1930), and those who create or help create and maintain a nuisance are liable for its abatement and damages. *Selma Pressure Treating Co., Inc. v. Osmose Wood Preserving Inc.*, 221 Cal. App. 3d 1601, 1616-20, 271 Cal. Rptr. 596, 604-608 (1990).

Prior to filing the CERCLA lawsuit, the State attempted to obtain voluntary compliance by Petitioner with an administrative cleanup order, which was issued in May 1992 to the Trustees and Executors. The administrative cleanup order required them to install a drinking water line in the nearby Stanley Park housing subdivision (Stanley

Park),[1] where the TCE contamination had spread to private wells, and to complete the investigation and cleanup of hazardous substance releases at and from the 20th Street Site. Because the Trustees and Executors failed to comply with the administrative cleanup order, the State filed suit.

The State moved for partial summary judgment against the Trustees and Executors on, *inter alia*, the state law nuisance claims for injunctive relief under California Civil Code 3494 to require them to undertake the remedial measures detailed in the administrative order cleanup order.[2] Petition App. B at B-57 to B-58. The existence of groundwater contamination at the 20th Street Site and in the wells located offsite in the downgradient direction from the Site, in the direction of Stanley Park, was undisputed. However, the Trustees and Executors disputed that the off-site TCE contamination in the intermediate groundwater was caused by releases from the 20th Street Site. Petition App. B at B-54. They asserted that the Louisiana-Pacific property, which is located between the 20th Street Site and Stanley Park, was the source of the offsite contamination at Stanley Park.

In support of its motion for a permanent injunction to abate the public nuisance, the State filed: (a) affidavits by former employees of Victor Industries whose uncontroverted testimony stated that for almost two decades Victor Industries dumped large quantities of TCE onto the ground at the Site; (b) results of numerous groundwater, soil gas and soil sampling taken at and near the 20th Street Site which supported the finding that TCE had been dumped at the Site

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1. The drinking water line was completed after the injunction issued from the district court.

2. The State also moved for summary judgment to establish defendant's CERCLA liability, but not on the amount of costs.

and caused groundwater contamination that was flowing from the Site in the direction of the nearby Stanley Park housing subdivision wells; (c) the report of an environmental consultant retained by the Trustees which also supported the determination that TCE groundwater contamination at and from the Site flowed in the direction of the housing subdivision wells; (d) evidence from samples which established that the groundwater was contaminated before it reached the Louisiana-Pacific property; and (e) extensive testing of soil and soil gas studies at the Louisiana-Pacific property which found no source of TCE at that location.

In opposing the State's motion for an injunction, the Trustees and Executors requested a continuance claiming that they needed more time for discovery to bolster their theory that the Louisiana-Pacific property was a possible source of contamination at Stanley Park. However, they did not present an affidavit in support of the request for a continuance as required by Fed. R. Civ. Proc. 56(f); nor did they serve any discovery. In an attempt to create a genuine issue of material fact, they did submit the affidavit of a consultant.

At the hearing on the summary judgment motion, the district court properly exercised its broad discretion and rejected the request for a continuance noting that the Trustees and Executors failed to make an adequate showing that additional time to undertake discovery was warranted. The district court proceeded to rule on the substantial record before it.

In ruling on the affidavit of the consultant submitted by the Trustees and Executors to support their theory that the Louisiana-Pacific property was the source of TCE contamination at Stanley Park, the district court found that the consultant's opinions were based on flawed methodology and, thus, could not be accorded evidentiary

weight. Petition App. B at B-55 to B-56. Furthermore, the consultant failed to controvert the fact that the groundwater was already contaminated with TCE before it reached the Louisiana-Pacific property.

Upon careful examination of the substantial evidence presented, the trial court concluded that the State had met its burden of establishing groundwater contamination at the 20th Street Site and that the groundwater contamination had extended downgradient from the Site to Stanley Park. Thus, issuance of a permanent injunction was warranted under well-established California public nuisance law, California Civil Code section 3494, to abate the groundwater contamination at and from the 20th Street Site. Petition App. B at B-57 to B-60. Accordingly, on August 5, 1993, the district court granted the State's request for an injunction.[3/] The injunction required construction of a water line, as well as completion of the investigation and cleanup of hazardous substance releases at and from the 20th Street Site.

B. Proceedings Before the Ninth Circuit

On September 7, 1993, the Trustees and Executors, raising a host of issues, filed an interlocutory appeal of the district court's summary judgment order. The Ninth Circuit concluded it only had appellate jurisdiction to review the challenge to the injunction--a determination made solely under state law. Petition App. A at A-29.

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3. The district court also found that the State had established that the Trustees and Executors were liable parties under CERCLA. Petition App. B. at B-56 to B-57.

The parties submitted extensive briefing to the Ninth Circuit, including supplemental briefs requested by the appellate court and diagrams explaining the groundwater flows and location of monitoring wells at and near the 20th Street Site. After careful review of the lower court record, the appellate briefs and oral argument, the Ninth Circuit affirmed the district court's state law injunctive order to abate the public nuisance.

The Ninth Circuit thoroughly examined the record and applied well-established principles of law. It concluded that the district court did not abuse its discretion in: (a) rejecting Trustees' and Executors' request for a continuance under Fed. Rule Civ. Proc. 56(f) because they failed to meet their burden of demonstrating that a continuance was warranted (Petition App. A at A-29 to A-35; A-40, n.3) and (b) declining to give evidentiary weight to the opinions of Petitioner's consultant because the consultant's opinions did not create a genuine dispute. The Ninth Circuit properly concluded that based on the substantial record before the court "no reasonable juror could conclude that the Louisiana-Pacific property, rather than the 20th Street Property, was the source of contamination at Stanley Park." Petition App. A at A-39 to A-40. Further, the Ninth Circuit concluded that "there is no genuine dispute about which property polluted the water at Stanley Park and the other offsite locations." Petition App. A at A-41. Thus, the Ninth Circuit found that the district court did not err as a matter of law when it determined that the requisite causation had been demonstrated by the State. Thus, the Trustees and Executors were liable under California's nuisance laws and issuance of the injunction directing them to abate the nuisance was warranted under the facts. Petition App. A at A-45.

The Ninth Circuit added that for the State to establish its claim under California public nuisance law it sufficed to demonstrate that the groundwater under the 20th

Street Property was contaminated. Petition App. A at A-41 to A-43. There is no dispute that the groundwater at the 20th Street Property is contaminated. The appellate court also concluded that the district court properly found that the Trustees and Executors "maintained a nuisance by administering property where hazardous chemicals were polluting the water." Petition App. A at A-44 to A-45. Accordingly, an injunction to abate the nuisance was appropriately issued under state nuisance law.

REASONS FOR DENYING WRIT

The Petition should be dismissed in its entirety because it challenges only the trial court's factual findings and evidentiary rulings, which were carefully examined and affirmed by the Ninth Circuit, and also because it fails to present any significant federal issues of federal law involving a conflict between the circuits.

I.

PETITIONER'S DISSATISFACTION WITH FACTUAL FINDINGS AND EVIDENTIARY RULINGS MADE BY THE DISTRICT COURT AND UPHELD BY THE NINTH CIRCUIT AFTER CAREFUL REVIEW IS NOT GROUNDS FOR ISSUANCE OF THE PETITION

The bases for this Petition is Petitioner's dissatisfaction with factual and evidentiary rulings made by the district court and upheld by the Ninth Circuit after careful review. Petition 7-19. Specifically, Petitioner objects to the rulings below pertaining to: (a) the request for a continuance on the State's summary judgment motion for injunctive relief and (b) the opinions of Petitioner's expert--whether they sufficed to create a genuine dispute as to an issue of material fact. The opinions of the courts below confirm that both courts carefully considered the same arguments now raised by Petitioner, applied well-established principles of law to the facts of the case, and properly rejected these arguments.

A party's dissatisfaction with the factual and evidentiary rulings by the lower courts is not grounds for issuance of a Petition by this Court, especially where, as here, careful examination of these same issues now raised in the Petition was given by the federal appellate court. It has long been recognized that this Court "does not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Moreover, this Court, "rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact of two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc., v. Linde Co.*, 336 U.S. 271, 274-75 (1949);

accord, Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1997). Such a showing has not been, and cannot be made, in this case.

II.

THE PETITION SEEKS REVIEW OF STATE LAW ISSUES AND DOES NOT PRESENT ANY CONFLICT BETWEEN THE CIRCUITS ON AN ISSUE OF FEDERAL IMPORTANCE

Denial of the Petition is also warranted because the legal issue presented--whether the injunction issued solely under state nuisance law should stand--is akin to those cases where review is sought of a state court judgment based on state law grounds. It is well established that this Court will not review a state judgment that is based on adequate and independent state grounds. *Cf., Michigan v. Long*, 463 U.S. 1032, 1037-1042 (1983); *Fox Film Corp. v. Muller*, 296 U.S. 207,10 (1935) ("Where the judgment of the state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.").

As the Ninth Circuit underscored, issuance of the injunction by the district court was based solely on California nuisance law and was not intertwined with any provision of CERCLA. Petition App. A at A-26 to A-28. Because the state ground is the sole basis for issuance of the injunction challenged in this Petition, this Court must decline jurisdiction. The straight forward application of state law to

the undisputed facts of a case cannot serve as a basis to trigger this Court's extraordinary review.[4/]

In an apparent attempt to craft an issue of federal concern to entice this Court's review, Petitioner now argues for the first time that in federal court CERCLA is the sole means to pursue injunctive relief for the cleanup of environmental contamination, and, therefore, the district court erred in issuing the injunction under California nuisance law. Petitioner urges issuance of the Petition on these grounds. Petition at 19-21.

The CERCLA argument presented in the Petition was never raised to the courts below. The only issue properly before the Ninth Circuit was the issuance of an injunction under state law. No CERCLA issues were decided on appeal. Thus, Petitioner's attempts to create an issue under CERCLA for review by this Court should be deemed waived and rejected as a ground for issuance of this Petition. *See, Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 8, 113 S.Ct. 2462, 2465-66 (1993) (Court declines to consider legal arguments of respondent neither raised nor considered below.)

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4. In a disingenous attempt to convince the Court that this case presents a conflict with numerous other circuit court opinions, Petitioner cites several opinions from other circuits for the proposition that the Ninth Circuit's opinion is at odds with those decisions. Petition at 17-19. Petitioner is wrong. None of the cases cited address an injunction issued under California public nuisance law. Of the opinions cited by Petitioner, several involve personal injury or business injury claims under various state law theories. Those cases that do discuss nuisance claims were decided under laws other than California public nuisance laws and are factually distinguishable. Moreover, each of these decisions turned on its particular facts. In sum, the Petition does not present an issue of significant federal concern, let alone any issue presenting a conflict between federal circuit courts.

Further, a review of section 106(a) of CERCLA relied on by Petitioner demonstrates that CERCLA is an additional tool available for the federal government to work in concert with states to compel cleanup of a site--it is not the exclusive means for injunctive relief by a regulatory body as Petitioner would have this Court believe. *See*, 42 U.S.C. section 9606(a) (authorizing the federal government to seek relief to abate an environmental nuisance in addition to any other action taken by a state or local government). Finally, nothing in CERCLA limits federal district courts from exercising their pendent court jurisdiction over state law claims that are properly brought before them, as was the case here.

Petitioner's efforts to craft a question of federal import fail and the Petition should be denied.

CONCLUSION

Because the Petition: (1) merely raises challenges to evidentiary and factual determinations made within the sound discretion of the trial court that were thoroughly examined below and upheld by the circuit court; (2) presents only a state law issue which is amply supported on adequate and independent state grounds; and (3) is not relevant to any substantial federal question or constitutional right, the Petition should be denied.

Dated: July 10, 1998.

Respectfully submitted,

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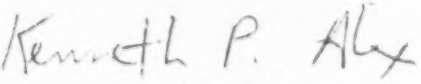

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